DOVER
(302) 739-4263
(302) 739-6122 FAX
(302) 739-7428 TDD

18 THE GREEN
DOVER, DELAWARE 19901
TOLL FREE: (888) 363-8808

WILMINGTON
(302) 577-5001
(302) 577-5021 FAX

April 8, 2020

Joseph M. Otting
Office of Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, DC 20219
Docket ID OCC-2018-0008
RIN 1557-AE34
Via email: cra.reg@occ.treas.gov

Jelena McWilliams, Chair
Board of Governors
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429
RIN 3064-AF22
Via email: Comments@fdic.gov

RE: **Notice of Proposed Rulemaking, Community Reinvestment Act Regulations**

Dear Comptroller Otting and Chair McWilliams:

The Delaware State Housing Authority ("DSHA") writes in response to the request for comments related to the Community Reinvestment Act ("CRA") issued by the Office of Comptroller of the Currency ("OCC") and Federal Deposit Insurance Corporation ("FDIC") at 85 Fed. Reg. 1204 titled "Community Reinvestment Act Regulations" (the "Proposed Rule"). In addition to serving as the public housing authority for two of Delaware's three counties, DSHA coordinates Delaware's housing policy agenda, administers a robust single-family lending program, provides State funded debt financing for affordable housing development, administers CDBG, HOME and other HUD programs, and is Delaware's allocating agency for the Low Income Housing Tax Credit, among other significant affordable housing activities.

DSHA opposes the Proposed Rule's changes to the CRA regulations. In addition to numerous specific concerns outlined below, the unprecedented decision to abandon regulatory uniformity and break with the Federal Reserve Board will create substantial and unnecessary community confusion by enacting an arbitrary two tier regulatory approach to CRA performance. FDIC and OCC should discard this proposal and work with the Federal Reserve Board to write and propose

an interagency rule that builds on the progress achieved under CRA while making uniform thoughtful improvements to the regulatory approach.

The Proposed Rule's deposit based assessment area regime is confusing and arbitrary because it is based on currently non-existent data and will result in the capricious loss of CRA activity in Delaware along with extensive nationwide disruption, uncertainty, and administrative burden to create an entire new data and reporting regime.

The implementation of a deposit based assessment area regime is one of the most significant changes to CRA regulatory oversight in the Proposed Rule. Given the significance of this change, it is astounding that the preamble to the Proposed Rule notes that "Deposit data [...] have limitations because the current reporting framework records deposits by attributing them to a branch location, rather than the account holder's address and [current data] **uses a different definition of deposits than the proposed rule.**"[1] (emphasis added). Restated, the Proposed Rule, if implemented, would dramatically redistribute the geographic focus of CRA obligations based on deficient data that are by definition incompatible with the Proposed Rule itself.

The specifics of geographic redistribution are unknowable because the data the Proposed Rule bases the redistribution on *does not exist*. Implementing a nationwide redistribution of CRA assessment areas on admittedly non-existent data is not only reckless, but will almost certainly cause arbitrary and capricious harm to Delaware. Because the Proposed Rule's depositor based data does not exist, exact calculation of the impact is impossible. However, DSHA's industry partners estimate the Proposed Rule will redistribute nearly $320,000,000,000 of currently CRA qualifying deposits out of the state. This would represent a loss of over 90% of Delaware's CRA qualifying deposits, ultimately resulting in an incalculable loss of CRA activity from our longstanding financial institution partners.

In addition to the particularly capricious harm the Proposed Rule will cause Delaware, the drastic geographic redistribution of assessment areas will cause nationwide confusion. Regulated entities and their community partners will be left to fly in the dark while a new reporting and data collection regime is established on the fly. After weathering the uncertainty and administrative burden of creating after the fact data to implement the geographic redistribution of CRA assessment areas, the Proposed Rule's model is likely to further exacerbate the issue of CRA hot spots. The Proposed Rule's depositor based approach will further focus assessment area emphasis on locations where a high concentration of wealthy depositors live. This result would be in direct conflict with the stated purpose of the CRA itself which is intended to incentivize qualifying activity in historically disinvested locations.

As FDIC Board Member, Martin J. Gruenberg notes opposing the Proposed Rule in his letter dated December 12, 2019: "The assumption that data may improve in the future is not an

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[1] Proposed Rule, at 84 FR 1222

appropriate basis for proposing changes to the CRA regulations now based on currently available data that is known to have deficiencies." [2]

In order to avoid an arbitrary and capricious geographic redistribution of CRA obligations, the OCC and FDIC must abandon the Proposed Rule's deposit based assessment area regime and should work with the Federal Reserve to craft comprehensive improvements to assessment area delineation founded on a reasonable analysis of currently available data.

Implementing the Proposed Rule as written will depress the value of the Low Income Housing Tax Credit resulting in less equity for affordable housing production and preservation while costing the federal government the same amount.

The Low Income Housing Tax Credit ("LIHTC") has been the most successful affordable rental housing production and preservation program. The LIHTC has resulted in the creation of over 6,000 units of affordable housing in Delaware and continues to be Delaware's primary tool for the creation and preservation of affordable rental housing. Relying on public-private partnership, the LIHTC allows equity investors in affordable housing to claim federal tax credits. In addition to these tax savings, comprehensive industry analysis shows that over 80% of LIHTC equity investors are CRA motivated. The equity that investors are willing to contribute to LIHTC projects depends on complex factors, including the relative value of the tax credit, market conditions impacting return on investment, and the need to meet CRA investment goals. When the value of the LIHTC is depressed, the federal government foregoes the same $1 in tax revenue, but the community receives less in the form of equity.

A comprehensive nationwide study performed by CohnReznick[3] found an approximately 35% decrease in the value of the LIHTC in CRA deserts versus CRA hot spots. While a significant portion of this difference in value is undoubtedly attributable to factors other than demand for CRA qualifying investments, CohnReznick found that other market factors do not adequately explain the delta. Based on decades of experience administering the LIHTC program, DSHA estimates the Proposed Rule will result in a 7-15% decrease in value. This means that for every $1 of LIHTC allocation, Delaware will receive between $.07-.15 less equity. Delaware receives the small state set aside and expects to receive approximately $3,217,500 in LIHTC authority in the 2020 round. Since the LIHTC is clamed annually over a period of 10 years, the $3,217,500 represents a total of $32,175,000 in LIHTC. DSHA estimates the Proposed Rule will result in an estimated annual loss of $2,000,000 - $4,000,000 in equity to support affordable housing production and preservation in Delaware.

The Proposed Rule will devalue the federal government's most significant investment in affordable housing through two mechanisms, the one ratio assessment and the expansion of eligible activities.

[2] Gruenberg, Martin J., "Notice of Proposed Rulemaking: Community Reinvestment Act Regulations", Letter at Page 4 (December 12, 2019).

[3] CohnReznick, "The Community Reinvestment Act and Its Effect on Housing Tax Credit Pricing" at page 6.

- The one ratio assessment methodology will disadvantage LIHTC equity investment in favor of simpler transactions that do not involve the community and transactional complexities associated with affordable housing development.
- The expansion of eligible activities will disadvantage LIHTC equity investment in favor of simpler transactions that do not involve the community and transactional complexities associated with affordable housing development.

The arbitrary one ratio assessment approach creates a 'count the widgets' regime which is fundamentally discordant with the CRA's mandate to be responsive to community needs. The OCC and FDIC should abandon the arbitrary one ratio approach and work in collaboration with the Federal Reserve Board to expand and improve the current multi factor assessment approach.

The Proposed Rule's expansion of eligible activities risks diluting the impact of the CRA beyond recognition. DSHA has heard from Delaware partners that some institutions may be able to nearly or fully meet the Proposed Rule's CRA benchmarks by simply relying on relabeling regular market based business as CRA activity. While improved clarity around CRA qualifying activities could improve the regulatory framework by prioritizing CRA mandated responsiveness to community needs, the Proposed Rule's dramatically overbroad expansion of eligible activities abandons this opportunity and risks deleterious impact on regulated entities existing community partnerships. The OCC and FDIC should abandon the expansion of eligible activities as contemplated in the Proposed Rule and engage in a collaborative and thoughtful process with the Federal Reserve Board to meaningfully clarify eligible CRA activity while preserving the focus on the activities mandated by the CRA.

In addition to damaging the production and preservation of affordable housing in Delaware and throughout the country, the Proposed Rule will deprive the federal government of bang for its buck in the LIHTC program. If the Proposed Rule is implemented, the same foregone revenue from the LIHTC will result in less investment.

Implementing the Proposed Rule as written will depress the value of Housing Finance Agency affordable homeownership programs resulting in increased cost for homeowners and pricing out otherwise qualifying potential purchasers.

The Community Reinvestment Act is frequently described as the most significant anti-redlining accomplishment of the civil rights area. Discriminatory exclusion from homeownership opportunities was a primary motiving factor for the enactment of the CRA. Expanding access to lending and homeownership opportunities is perhaps the single most important goal of the CRA.

Housing Finance Agencies ("HFA"), like DSHA, have had enormous success making the dream of homeownership a reality for low and moderate ("LMI") purchasers. Over its history, DSHA has helped make homeownership available to 32,750 Delaware families leveraging over $4,000,000,000 of mortgage investment for Delaware. DSHA offers a variety programs including down payment assistance, first-time homebuyer loans, and numerous other financing products with favorable rates and terms targeted at expanding homeownership opportunity for LMI Delawareans.

A primary mechanism DSHA utilizes to finance these programs is participation in the Mortgage Backed Security ("MBS") market. In the MBS market, certain CRA regulated entities are willing and able to pay above market for DSHA backed investments. This incentive pricing, in turn, allows DSHA to pass the benefit to LMI participants, primarily in the form of lower interest rates. This incentive pricing is available due to the CRA performance benefits offered by making CRA qualifying purchases with DSHA.
When calculating CRA performance, the Proposed Rule offers a 2x multiplier to certain activities with certain exclusions (the "Multiplier"). In an effort to disincentivize MBS 'churning' for CRA credit, the Proposed Rule excludes any activity related to MBS from the Multiplier. This broad exclusion would include HFA sponsored MBS which support affordable homeownership lending.

After observing market conditions, DSHA estimates that the current CRA incentive pricing DSHA receives in the MBS market allows DSHA to offer .25% lower interest rates to LMI borrowers participating in homeownership programs. The average DSHA loan is about $180,000, meaning that this .25% represents an average of $10,000 in savings to the LMI purchaser over the life of the loan. In addition to this direct savings, offering lower rates makes DSHA products more competitive which allows DSHA to scale its homeownership programs to the benefit of LMI purchasers. This lower rate can be the make-or-break difference for a potential LMI purchaser between achieving the dream of homeownership or being priced out of purchase.

The Proposed Rule's MBS exclusion is overbroad. The stated goal of reducing MBS churning for CRA credit would be adequately achieved through the balance sheet approach which provides CRA credit only for the period securities are held combined with excluding secondary market MBS purchases from the Multiplier. Excluding DSHA's affordable homeownership backed MBS from the Multiplier will increase costs to LMI borrowers, reduce the volume DSHA is able to offer, and price otherwise qualifying LMI Delawareans out of the opportunity to become homeowners.

In direct contravention to a core purpose of the CRA itself, the Proposed Rule will needlessly damage DSHA's ability to expand homeownership opportunities to Delaware's LMI residents. While DSHA believes OCC and FDIC should abandon the Proposed Rule in favor of a unified approach in partnership with the Federal Reserve Board, a simple change to the Proposed Rule could avoid this particular unnecessary harm:

- The rule should be changed at §345.07(b)(1) to apply the multiplier to first purchase of HFA sponsored MBS.
- DSHA currently relies primarily on the MBS market to support its affordable homeownership programs, however DSHA has and many other HFAs do rely on bond financing to support affordable homeownership programs. The rule should also be changed at §345.07(b)(1) to apply the multiplier to HFA sponsored single family and multi-family mortgage revenue bonds.

Implementing the Proposed Rule as written will damage housing focused community partners including homeownership counseling agencies, community development corporations, and community development financial institutions by diluting CRA incentives for supporting these partners.

In an effort to provide needed clarity around what activities qualify for CRA performance purposes, the Proposed Rule dramatically expands CRA eligible activities. DSHA agrees with its industry partners that additional eligible activity clarity would be an important way to strengthen the regulatory implementation of the CRA. Done thoughtfully, this eligible activity clarity could target CRA performance to communities and individuals facing the most significant financial disinvestment challenges. Unfortunately, the Proposed Rule's overbroad expansion of eligible activities risks diluting the impact of the CRA beyond recognition.

The Proposed Rule includes credit card lending, auto loans, overdraft fees, along with 'other revolving credit plans' as specifically enumerated eligible activities. Placing emphasis on this type of lending as CRA qualifying presents the significant risk of allowing regulated entities to simply reclassify portions of their market based activities that currently represent regular business as CRA activity. This reclassification will allow entities to receive CRA performance credit without offering any additional benefit to consumers or communities. Further, without significant additional clarity and restriction, the inclusion of these activities risks incentivizing regulated entities engaging in predatory lending practices while attempting to claim CRA credit. If the OCC and FDIC proceed with the implementation of the Proposed Rule, they must rework these eligible activity definitions to ensure adequate consumer protections and avoid reclassifying enormous sums of market based activity as CRA activity.

Throughout the Proposed Rule's expansion of eligible activities, many activities that "partially or primarily benefit low or moderate income individuals or families"[4] are included. The Proposed Rule defines Partially Benefits as "50 percent or less of the dollar value of the activity or of the individuals in the census tracts served by the activity."[5] Under the Proposed Rule's application of partially benefit and definition thereof, so long as at least $1 of an activity or 1 LMI individual is benefited, entire activities will qualify for CRA performance evaluation. This will arbitrarily allow an extraordinary classification expansion of incalculable amounts of market based activities as CRA activities for performance evaluation purposes. The OCC and FDIC should abandon or significantly narrow the inclusion of 'partially benefit' activities and raise the threshold of 'partially benefit' to activities that mean between 50 and 25 percent of the dollar value of the activity or of the individuals or census tracts served by the activity.

Analyzing the Proposed Rule's dramatic eligible activity expansions, DSHA has heard from Delaware partners that some institutions may be able to nearly or fully meet the Proposed Rule's CRA benchmarks by simply relying on relabeling market based business as CRA activity. As detailed throughout this comment, this reckless expansion will have a diluting impact damaging

[4] Proposed Rule at 85 FR 1243, 1256, *passim*.
[5] *Id.* At 1255.

the whole universe of activities currently supported by CRA performance incentives. However, it places a particularly grave threat to our non-profit community partners.

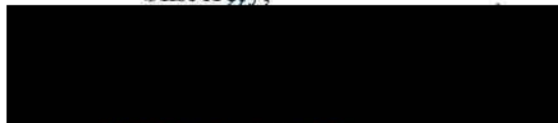
Housing counseling agencies, community development corporations ("CDCs"), and community development financial institutions ("CDFIs") have all crafted existentially important partnerships with CRA regulated entities. The Proposed Rule wisely includes activities related to these partnerships as eligible activities, and even applies the Multiplier. However, the enormous expansion of traditionally market based activity as CRA eligible activity risks shifting focus from community based partnerships, activities and investments. If the Proposed Rule is implemented and regulated entities are permitted to reclassify significant portions of their market based business as CRA activity, they will be disincentivized from continuing to invest in these partnerships at current levels. While the length and strength of these partnerships means the investments are unlikely to disappear immediately, the long term impact will cause regulated entities to shift focus and investment from these activities.

The relationships created between CRA regulated entities and community centered nonprofits, housing counseling agencies, CDCs, and CDFIs is a central goal of the CRA. By implementing the Proposed Rule without making drastic changes to the expansion of CRA eligible activities, the OCC and FDIC will be exercising their regulatory authority to arbitrarily and capriciously strike a blow to the center of the core relationships built and intended by the CRA.

The Proposed Rule abandons the opportunity to provided targeted clarity to CRA eligible activity and risks deleterious impact on regulated entities existing community partnerships. The OCC and FDIC should abandon the expansion of eligible activities as contemplated in the Proposed Rule and engage in a collaborative and thoughtful process with the Federal Reserve Board to meaningfully clarify eligible CRA activity while preserving the focus on community responsiveness and the central activities contemplated by the CRA.

Thank you for the opportunity to comment on the Proposed Rule and its changes to the Community Reinvestment Act Regulations. If you have any questions or would like to discuss, please contact Jack Stucker, General Counsel at jacks@destatehousing.com or Brian Rossello, Director of Housing Finance at brian@destatehousing.com

Sincerely,



ANAS BEN ADDI
Director

cc: Governor John Carney
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